United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1232

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION,
a corporation,
Appellant,

v.

THE AETNA CASUALTY AND SURETY CO.,
a corporation.

TORRINGTON CONSTRUCTION CO., INC.,

v.

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION,
a corporation,
Appellant,

v.

SYRACUSE RIGGING CO., INC.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK AT NOS. 72-CV-22 AND 72-CV-463 CIVIL ACTIONS.

REPLY BRIEF FOR APPELLANT

WILLIAM T. MARSH,
Brugh Avenue,
P. O. Box 751,
Butler, Pa. 16001,

EARL F. GALLUP, JR.,
McNAMEE, LOCHNER, TITUS & WILLIAMS,
75 State Street,
Albany, N. Y. 12201,

Attorneys for Appellant.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

INDEX.

CASE CITED.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

74-1232

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION, a corporation,

Appellant,

v.

THE AETNA CASUALTY AND SURETY CO., a corporation.

TORRINGTON CONSTRUCTION CO., INC.,

v.

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION, a corporation,

Appellant,

v.

SYRACUSE RIGGING CO., INC.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK AT NOS. 72-CV-22 AND 72-CV-463 CIVIL ACTIONS.

REPLY BRIEF FOR APPELLANT

---

1. Torrington's Attempt to Justify the Special Damages Awarded.

The brief for appellee on this appeal acknowledges the correctness of the principles of law set forth in the first section of our brief, which is at least a sign of some progress. Having come to this awareness, and realizing that the record could not possibly support an argument claiming that Fort Pitt knew in September or October 1969 of any supposed plans of Torrington to attempt to accelerate its work, Torrington has attempted a bootstrap operation which requires a reply.

Torrington now claims that the subcontract did not come into existence "legally" until some time after November 12, 1969; that the parties had already by then agreed to a delivery date of late June 1970; that Fort Pitt somehow knew the total job and that the bridge would be one of the last items of work; and that Fort Pitt should have been able to figure out that if Torrington wanted to start to erect the bridge in July 1970, it must have wanted to complete the project in 1970.

None of these points is correct, but we will not belabor the latter three because their viability rests entirely upon the validity of the first point—that the subcontract did not come into existence until after November 12, 1969. Paragraph 5 of the Torrington complaint alleges as follows (Appendix p. 33):

> "On or about September 5, 1969 defendant entered into a contract in writing with the plaintiff (a true copy of which is annexed hereto and marked Exhibit 1) which provided, among other things, for the furnishing, fabricating and erecting of the structural steel under the aforesaid Item 29, and following the execution of said contract by the respective parties to this action,

> said defendant duly requested plaintiff to inform it of its delivery and erection requirements for said structural steel, as evidenced by its letter of October 13, 1969, annexed hereto and marked Exhibit 2, to which plaintiff replied by its letter dated November 3, 1969, annexed hereto and marked Exhibit 3, stating that the plaintiff's requirements for delivery and erection of said structural steel would be late June, 1970."

Torrington's letter of May 12, 1970, attached to its complaint (Appendix pp. 49-50) refers to January 29, 1970 as being five months after Torrington's acceptance of the Fort Pitt proposal and further refers to May 12, 1970 as being nine months from Torrington's acceptance of the Fort Pitt proposal.

These are judicial admissions which cannot be revoked by Torrington at this late date to suit its convenience.

The first two sentences of Judge Holden's Conclusions are as follows (Appendix pp. 73-74, emphasis added):

> "Fort Pitt's bid on quotation to Torrington specified that delivery of the fabricated steel was to be mutually agreed upon. The correspondence *which followed Torrington's acceptance of the bid* establishes that June delivery in 1970 was the time the material was required. . . "

Accordingly, the bootstrap argument must fail because its entire foundation has already been conclusively contradicted by both Torrington and the lower court.

Torrington next claims that Fort Pitt at no time challenged or questioned the reasonableness or justness of the damages claimed and that Torrington's evidence on damages was uncontradicted. To the contrary, the transcript consists almost entirely of cross examination on damages and the major parts of the exhibits were Torrington's own

records contradicting its own claim. The fact of the matter is that Torrington worked the job on a continual overtime basis throughout 1970 and would have had to do so regardless of whether the steel had been shipped by Fort Pitt in late June 1970 (when, by the way, the piers and abutments weren't yet ready) or early August or late August. Although the lower court did not so find, it did disallow about two-thirds of the damages claimed, which the court would obviously not have done if the evidence had been uncontradicted.

Certainly the damages awarded to Torrington are not particularly substantial, but that is not the point. The principle involved is absolutely vital. The next time around the damages might be seven million instead of seven thousand.

2. Interest

The argument of Torrington on this point is the same argument made by the same counsel in the *Walsh* case cited in our original brief (240 F. Supp. 1019). In that case the district court for the Northern District of New York held that the creditor had an absolute right to interest under New York law and that the arguments as to whether interest had or had not been demanded were irrelevant.

We do agree with Torrington that it is unfortunate to have to ask the Court of Appeals to apply the correct rules of law relating to interest, because those rules are so simple and long-established.

Respectfully submitted:

WILLIAM T. MARSH,
Brugh Avenue, P. O. Box 751,
Butler, Pa. 16001,

EARL F. GALLUP, JR.,
McNAMEE, LOCHNER, TITUS
& WILLIAMS,
75 State Street,
Albany, N. Y. 12201,

Attorneys for Appellant.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Spangs Industries, Inc. et al
v
The Aetna Casualty & Surety Co. et al
Docket No. 74-1232

I, Roger J. Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 28 day of August, 1974 I mailed 5 copies of a printed Reply Brief in the above case, in a sealed, postpaid wrapper, to:

Homer E. Peters, Esq.

State Bank Building

Albany, New York 12207

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

William T. Marsh, General Counsel

Brugh Avenue, P. O. Box 751, Butler, Pa. 16001

Roger J. Grazioplene

Sworn to before me this

28 day of August, 1974

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee Co.
My Commission Expires March 30, 1975